

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

FEB 25 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2009-0276-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
DANIEL LEE BAKER,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20040490

Honorable Ted B. Borek, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Daniel Lee Baker

Phoenix
In Propria Persona

K E L L Y, Judge.

¶1 Petitioner Daniel Lee Baker seeks review of the trial court's order summarily dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb a trial court's ruling absent an abuse of discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 Baker was charged with aggravated driving under influence of an intoxicant (DUI) and aggravated driving with an alcohol concentration (AC) of .08 or more, both based on his license having been suspended, canceled, revoked, refused, or restricted; and aggravated DUI and aggravated driving with an AC of .08 or more having committed or been convicted of two or more prior DUI violations in the sixty months preceding this offense. After a jury trial, Baker was convicted of the first two counts and sentenced to concurrent prison terms of 4.5 years. Baker appealed, and his counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Although counsel raised no arguable issues, Baker raised numerous issues in his pro se, supplemental brief. *See State v. Baker*, No. 2 CA-CR 2004-0442 (memorandum decision filed Nov. 29, 2006). Addressing the issues Baker raised, we affirmed the convictions and the sentences imposed. *Id.*

¶3 Baker subsequently filed a notice of post-conviction relief pursuant to Rule 32. Appointed counsel avowed he saw no basis for seeking post-conviction relief. Baker

then filed a pro se petition in which he raised claims of ineffective assistance of trial counsel and newly discovered evidence. The trial court denied relief summarily and denied Baker's motion for rehearing.

¶4 On review, Baker contends the trial court abused its discretion by allowing the state to file its opposition to his petition below even though it was untimely; granting the state's request to summarily dismiss the petition; denying his motion for reconsideration; and summarily dismissing the petition "without issuing an opinion or stating its reasons." He also contends the court abused its discretion in rejecting his claims on their merits, insisting the claims were colorable and that he was entitled to an evidentiary hearing.

¶5 First, the state requested an extension of time for filing its response and it was for the trial court to decide whether to grant it. *See* Ariz. R. Crim. P. 32.6(a). It did so here and we see no abuse of discretion. Second, a trial court may, in its discretion, summarily dismiss a defendant's petition for post-conviction relief. *See* Ariz. R. Crim. P. 32.6(c). Even assuming, without deciding, that the court should have permitted Baker to file a reply before ruling, he was not prejudiced because he has not persuaded us on review that he raised colorable claims for relief in his petition.

¶6 Baker contended trial counsel had been ineffective in failing to request a competency examination pursuant to Rule 11, Ariz. R. Crim. P. In order to establish a colorable claim of ineffective assistance of counsel, a defendant must show counsel's

performance was deficient, based on prevailing professional norms, and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate the requisite prejudice, the defendant must show there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A colorable claim entitling the defendant to an evidentiary hearing is one which, if taken as true, “might have changed the outcome.” *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). The determination of whether a claim is colorable and warrants an evidentiary hearing “is, to some extent, a discretionary decision for the trial court.” *State v. D’Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988). In his affidavit attached to the state’s response, defense counsel stated he had met with Baker numerous times and knew Baker had sustained injuries in an accident, but had seen no basis for requesting a Rule 11 evaluation. Counsel noted Baker had participated in his own defense and had a good understanding of the nature of the proceedings against him. Baker has not established that, under the circumstances, counsel’s performance fell below professional norms.

¶7 Nor has Baker raised a colorable claim based on the fact that he had asked jail staff for a psychological examination; his request had stated only that he had issues and made no mention of injuries from a collision. Additionally, Baker appeared before the trial court at sentencing, exercising his right to allocution and did not give the trial court any reason to order a Rule 11 evaluation. As this court noted in rejecting Baker’s

related claim on appeal, nothing in the record supported his contention that he was “cognitively impaired and in a mentally diminished capacity.” *Baker*, No. 2 CA-CR 2004-0442, ¶ 16. Quoting the supreme court’s decision in *Drope v. Missouri*, 420 U.S. 162, 171 (1975), this court found no evidence Baker lacked “the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense.” *Id.*

¶8 Baker’s petition did not present newly discovered evidence as contemplated by Rule 32.1(e), despite his contention he had presented evidence of “diagnosable mental disorders,” resulting from the 2004 collision. But this information existed at the time of trial, as Baker himself concedes, since defense counsel knew of his car accident and head injuries. The medical records of Baker’s then-known head injuries do not, therefore, make the injuries newly discovered. *See State v. Bilke*, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989). Nor has Baker established he exercised due diligence in presenting the evidence. *See id.* The medical records existed at the time of trial, even assuming the conclusions Baker has now attempted to draw from the records may be new. Moreover, in light of the lack of any evidence that Baker did not understand the proceedings and was incompetent to stand trial, the evidence is not likely to have changed the outcome of the case. *See id.*

¶9 Finally, Baker appears to be challenging his sentences. However, his claims are precluded because they were raisable on appeal. Ariz. R. Crim. P. 32.2.

¶10 Baker has failed to establish the trial court abused its discretion in summarily dismissing his petition for post-conviction relief. Therefore, although we grant the petition for review, we deny relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge